

REMARKS UNDER 37 CFR § 1.111

Formal Matters

Claims 1-2, 11, 13-30 and 44-45 are pending after entry of the amendments set forth herein.

Claims 2, 16-19, 21 and 23-30 are currently withdrawn from consideration.

Claims 1, 11, 13-15, 20, 22 and 44-45 were examined. Claims 1, 11, 13-15, 20, 22 and 44-45 were rejected.

Applicants respectfully request reconsideration of the application in view of the amendments and remarks made herein.

No new matter has been added.

The Office Action

Claims Rejected Under 35 U.S.C. Section 112, First Paragraph

In the Official Action of March 26, 2007, claim 1 was rejected under 35 U.S.C. Section 112, first paragraph as failing to comply with the written description requirement. The Examiner asserted that the recitation of a retraction actuator is new matter, not disclosed in the specification. Applicants respectfully traverse this ground of rejection and submit that it would have been clear to one of ordinary skill in the art as to what is referred to as the retraction actuator upon reading the present disclosure, and since literal support is not required in the description. However, in order to advance the prosecution of the instant application, but without acquiescing to the Examiner's assertion since Applicants do not agree with it, claim 1 has been amended above to change "retraction actuator" to -retraction mechanism-. It is respectfully submitted that the term "retraction mechanism" is literally supported in the specification at paragraph [0045].

In view of the above amendments and remarks, the Examiner is respectfully requested to reconsider and withdraw the rejection of claim 1 under 35 U.S.C. Section 112, first paragraph, as being inappropriate.

Claims Rejected Under 35 U.S.C. Section 112, Second Paragraph

Claims 44 and 45 were rejected under 35 U.S.C. Section 112, second paragraph as being indefinite. The Examiner asserted that the term “essentially” is a relative term, which renders the claim indefinite and the term “flat” is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree. In response thereto, claims 44 and 45 have been amended to recite that the depressor surface comprises a tongue depressor-like structure. Support for these amendments can be found in the specification at paragraph [0040].

In view of the above amendments and remarks, the Examiner is respectfully requested to reconsider and withdraw the rejection of claims 44 and 45 under 35 U.S.C. Section 112, second paragraph, as being indefinite, as being no longer appropriate.

Claims Rejected Under 35 U.S.C. Section 102(b) (Nicholas et al.)

Claims 1, 11, 13-15, 20, 22 and 44-45 were rejected under 35 U.S.C. Section 102(b) as being anticipated by Nicholas et al., U.S. Patent No. 5,967,974. The Examiner asserted that Nicholas et al. discloses an access system with upper and lower spreader portions (Fig. 3, ref. numerals 114 and 126) capable of lifting the rib cage while depressing the abdomen to produce a substernal space. The Examiner asserted that the lower portion comprises a depressor portion capable of depressing the diaphragm and the abdominal organs. Referring to Fig. 3, 132a, the Examiner further asserted that the upper portion has two pair of hooks for contacting the sternal area. The Examiner asserted that the depressor portion is essentially flat, and that there are first and second side portions 113 positioned between the upper and lower spreader portions that are integrally connected to the upper and lower spreader portions. The Examiner asserted that the upper spreader portion has a screw-type retraction mechanism 128 for lifting and retracting the sternum.

Applicants respectfully traverse this ground of rejection. A proper anticipatory-type rejection under 35 U.S.C. Section 102 requires that a single reference disclose each and every feature recited in the rejected claims. With regard to claim 1, it is respectfully submitted that the Examiner has not identified, and Nicholas et al. does not disclose a hook mounted to a retraction mechanism via a swivel. Accordingly, it is respectfully submitted that Nicholas et al. clearly fails to anticipate claim 1.

Further, the Examiner has characterized the element 112 of Nicholas et al. as a “depressor”, which is “essentially flat”. However, Applicants note that Nicholas et al. describes element 112 as a

“fixed hook portion”, see column 3, lines 31-32. Accordingly, it is respectfully submitted that the Examiner has mischaracterized element 112, since a hook is clearly curved, and not essentially flat. Supporting this definition, Nicholas et al. discloses that the hook portion 132 of the device curves inwardly, see column 3, lines 45-47. The Examiner asserted that the hook 112 of Nicholas et al. is essentially flat, but includes a flange portion. It is respectfully submitted that Nicholas et al. does not describe a flat element with a flange, but describes a hook, which is curved.

The Examiner further asserted that the hook 112, in combination with the end portion 114 of the frame of Nicholas et al. would create a contoured surface that would be ideal for the curved shape of the diaphragm. Applicants strongly disagree. The diaphragm extends from the anterior ribs, in an umbrella-like fashion, all the way back to the spinal column, as illustrated in Fig. 1B of the present application. Accordingly, the hook element 112, which is shown with its free edge pointing downwardly in Figs. 1 and 2 of Nicholas et al., would spear into the broadly extending surface of the diaphragm if the device of Nicholas et al. were used in a manner as suggested by the Examiner. Nicholas et al. provides no evidence to the contrary. Rather, the Examiner has merely conclusively stated that the hook 112 of Nicholas et al. is contoured ideally for the curved shape of the diaphragm. To the contrary, Nicholas et al. describes that the hook 112 is provided to bias against a rib, e.g., see column 4, lines 64-65.

With regard to claim 11, the Examiner has indicated that the device of Nicholas et al. includes two pairs of hooks 132a for contacting the sternal area. Applicants respectfully traverse this interpretation. Nicholas et al. describes at column 3, lines 45-48 that adjustable hook member 126 is provided with hook portion 132 that may be provided with slotted openings 132a to facilitate gripping bone and/or tissue. Accordingly, it is respectfully submitted that Nicholas et al. discloses only one hook 132 and that elements 132a are slotted openings, not hooks. To further clarify the distinction of the present invention over Nicholas et al., Applicants have amended claim 11 above to recited that each of the hooks has a free end portion that is independent of the other. It is respectfully submitted that the hook portion 132 of Nicholas et al. is a single hook and that the slotted portions are all integrated at the free end of the hook portion 132.

In view of the above amendments and remarks, the Examiner is respectfully requested to reconsider and withdraw the rejection of claims 1, 11, 13-15, 20, 22 and 44-45 were rejected under 35 U.S.C. Section 102(b) as being anticipated by Nicholas et al., U.S. Patent No. 5,967,974, as being clearly inappropriate.

Conclusion

Applicants submit that all of the claims are in condition for allowance, which action is requested. If the Examiner finds that a telephone conference would expedite the prosecution of this application, please telephone the undersigned at the number provided.

The Commissioner is hereby authorized to charge any underpayment of fees associated with this communication, including any necessary fees for extensions of time, or credit any overpayment to Deposit Account No. 50-2653, order number GUID-036.

Respectfully submitted,
LAW OFFICE OF ALAN W. CANNON

Date: _____

6/19/07

By: _____



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